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IN THE

Supreme Court of the United States

October Term, 1971

No. _____

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Paris Adult Theatre I and Paris Adult Theatre II, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered in this case on November 18, 1971.

OPINIONS BELOW

Two movies shown, respectively, at Paris Adult Theatre I and Paris Adult Theatre II, were found not to be obscene in the constitutional sense as a matter of law by the Trial Court in two equitable proceedings to have the films declared obscene, which were consolidated for trial. The opinion of the Trial Court is unreported, but a copy thereof is attached hereto as Appendix "A". Respondents herein appealed each case to the Supreme Court of Georgia and that Court found the movies "Magic Mirrow" and "It All Comes Out In The End" to be obscene in an opinion applicable to both cases, dated November 5, 1971. That opinion is reproduced herein as Appendix "B". Because the Supreme Court of Georgia overlooked the Stipulation of Record filed by the parties in that Court, which pointed out that the Trial Court hearing had been a final hearing on the merits, both sides filed Petitions for Rehearing. Both Petitions for Rehearing were denied by the Court on November 18, 1971, and a new opinion was substituted on that date for the Court's first opinion. The final opinion of the Supreme Court of Georgia is attached hereto as Exhibit "C". That opinion is reported at 228 Ga. 343 (1971).

JURISDICTION

The Supreme Court denied the Petitions for Rehearing and substituted its final opinion for that entered on November 5, 1971 on November 18, 1971. This Petition For A Writ Of Certiorari is filed within ninety (90) days of that date. Jurisdiction is invoked under *28 U.S.C. §1257(3).*

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Trial Court To Be Not Obscene, But By The Supreme Court Of The State Of Georgia To Be Obscene, Are Not Obscene In The Constitutional Sense And Are Protected Expression Under The *First* and *Fourteenth Amendments* To The *United States Constitution?*

2. Whether There Can Be A Constitutionally Valid Judical Determination Of Obscenity As To Each Of The Films Brought Before The Supreme Court, Consistent With Petitioners' Rights To Procedural And Substantive Due Process Required By The *Fifth* and *Fourteenth Amendments* To The *Constitution Of The United States*, In The Absence Of Any Affirmative Evidence On Each Of The Constitutionally Relevant Elements Of The Standards For Judging Proscribable Obscenity Under The *First Amendment?*

3. Whether The State Of Georgia May, Consistent With The *First, Fourth, Fifth,* and *Fourteenth Amendments* To The *Constitution Of The United States*, Utilize *Ad Hoc* Procedures To Enjoin Dissemination Of Presumptively Protected *First Amendment* Materials Where There Is No Statutory Or Authoritative Judicial Decision Authorizing The Same With Appropriate Procedural Safeguards?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth, Sixth,* and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of *Georgia Code* §*26-2101* are set forth in Appendix "D" hereto.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date. Subsequently, on the same day, two separate complaints (one for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity. Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him.

The hearing was stipulated by the parties to be a final one. At said hearing on the issue of the obscenity of the

films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex and that the films were of value to society, and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name. There was no evidence that minors had ever entered the theatres or seen the films.

At the conclusion of the evidence, the Trial Court took under advisement the Motions to Dismiss filed by Petitioners which raised, *inter alia*, the contention that the films were not obscene in the consitutional sense as a matter of law and were protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*. Subsequently, the Trial Court granted the Motions to Dismiss on the ground that the films were not obscene. Timely appeal was taken by Respondents, and the Trial Court was reversed on November 5, 1971, with Petitions for Rehearing being denied on November 18, 1971.

REASONS FOR GRANTING THE WRIT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE TRIAL COURT TO BE NOT OBSCENE, BUT BY THE SUPREME COURT OF THE STATE OF GEORGIA TO BE OBSCENE, ARE NOT OBSCENE IN THE CONSITUTIONAL SENSE AND ARE PROTECTED EXPRESSION UNDER THE *FIRST AND FOURTEENTH AMENDMENTS* TO THE *UNITED STATES CONSTITUTION.*

At the time of the hearing before the Trial Court in the case at bar, the Prosecution contended that the two (2) movies were obscene under Georgia Law and under the *First Amendment* to the *Constitution of the United States.* Counsel for Petitioners contended that the two (2) motion picture films before the Court were not hard-core pornography or obscene in the constitutional sense as set forth in the various constitutional standards for judging obscenity set forth by the members of this Court in *Redrup v. New York,* 386 U.S. 767 (1967). Petitioners, by their counsel, further contended before the Trial Court that the movies were, at the most, borderline, as would be all publications that dealt with an erotic theme, but that did not render them obscene in the constitutional sense.

Counsel for Petitioners further contended that borderline publications are entitled to the mantle of the full constituional protections of Free Speech and Press under the *First* and *Fourteenth Amendments* to the *Constituion of the United States unless* the conduct of the exhibitor was such as to encroach on the rights of others whose responsibility it was

for the State of Georgia to protect through its legal processes.

In this regard, Counsel for Petitioners was relying on the words of the Court set forth in *Roth v. United States*, 354 U.S. 476 (1957) at page 489 where it was written:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the State. The door barring federal and state intrusion into this area (obscenity litigation and the free press rationable) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

Counsel for Petitioners herein urged to the Trial Court that the comment in the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966) which later became the foundation of the *Per Curiam* opinion of the Court. *Redrup v. People of the State of New York, supra*, was particularly applicable where the learned Justice wrote, in part, as follows at footnote 1 of his opinion at page 498:

> "1. Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g., Breard vs. Alexandria, 341 U.S. 622; Public Utilities Commission v. Pollak, 343 U.S. 451; Griswold vs. Connecticut, 381 U.S. 479. Still other considerations might come

into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

The words of the Court in the *Per Curiam* Opinion in *Redrup v. New York, supra* contain in essence the same observation made by Mr. Justice Stewart in *Ginzburg v. U.S.* where the Court at page 769 wrote as follows:

"IN NONE of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince vs. Massachusetts, 321 U.S. 158; cf. Butler vs. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard vs. Alexandria, 341 U.S. 622; Public Utilities Comm'n vs. Pollak, 343 U.S. 622. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg vs. United States, 383 U.S. 462."

The Trial Court was also exposed to a list of the cases considered by the U.S. Supreme Court which had been reversed predicated on *Redrup v. New York, Supra.* Predicated on what the Trial Court understood was meant by the various rulings of this Court as to non-hard-core material, the said Trial Court sitting as both Judge and Jury in its written opinion dated April 12, 1971 and reproduced in full in the Appendix to this Petition, stated in part as follows:

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be

considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness."

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against exposure of these films to minors, is constitutionally permissible."

"It is the Judgement of this Court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."

The Trial Court was, we suggest, correctly following the law as it has been ennuciated by this Court in the decisional processes. This Court has considered films of even a more explicit nature than the motions pictures at bar and in the absence of factors which would suggest circumstances of dissemination that would intrude onto the rights of others, or minors, have reversed the following based on *Redrup v. New York, Supra:*

1. *Harry Schackman v. California,* 388 U.S. 454 (1967).

This Court reversed the Superior Court of California which had affirmed the conviction of appellant for utilizing coin operated "peep-show movies" that were charged as being obscene. The Supreme Court decision was per curiam,

contained no description of the movies and referred to *Redrup* as controlling authority for holding the movies not obscene.

A look at the travel of the case will reveal a description of the films by the United States District Court for the Central District of California in the matter styled *Schackman v. Arnebergh*, 258 F. Supp. 983 (1966). The appellant originally had been arrested for trial in a California state court. The defendant thereafter filed a complaint in federal court seeking to convene a three-judge court on constitutional grounds, which relief was refused. An appeal was then taken to the Supreme Court of the United States which held by per curiam opinion that the proper route of appeal in those circumstances was by way of the Court of Appeals and denied the appeal, *Schackman v. Arnebergh*, 387 U.S. 427. Thereafter the state trial court convicted the defendant and he appealed through the state courts and ultimately to the Supreme Court of the United States where his conviction was reversed and the Court held the material not obscene.

The descriptive opinion in the federal district court, 258 F. Supp. 983, stated, *inter alia:*

"1. As to 0-12:

> "The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, lips and torso, all clearly indicative of engaging

in sexual activity, including simulated intercourse and invitations to engage in intercourse.

"There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you,' 'fuck me.' The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area."

"2. 0-7:

"The model wears a garter belt and sheer transparant panties through which the pubic hair and external parts of the genitalia area clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal regions and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area."

"3. D-15 was held to be substantially the same in character and quality as the films 0-12 and 0-7.

. . .

"33. The film E-44 'Susan, referred to in paragraph 11 of the petitioners' complaint and introduced as Exhibit 4, is virtually the same as Exhibits 1, 2 and 3. In addition, the model uses her hands, fingers, lips and tongue to simulate an act of oral copulation. Again, the pubic hair is visible together with the external parts of the genitalia and the focus of the camera emphasizes this area. The model continuously simulates acts of a sexual nature, including sexual intercourse and invitations to engage in such activity. The dominant theme of the film, taken as a whole, is to the prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

"34. The film known as Exhibit 19, of the Los Angeles Municipal Court Case No. 150754, referred to in paragraph 4 of the complaint and introduced as Exhibit 5, was viewed by the Court. The Court finds Exhibit 5 to be not quite as repugnant nor flagrant an example as Exhibits 1 through 4. In Exhibit 5, the pubic hair cannot be seen and the simulation of sexual intercourse is not as patent. Still, the model moves her body and hands in obviously sexual ways to simulate sexual activities and the camera's focus again emphasizes the pubic and rectal regions. The dominant theme of the film, taken as a whole, is to a prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance."

In the Opinion it was further stated:

"The Court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable

purview and ambit of both the Federal judicial definition of obscenity and hard core pornography."

This Court found the above described films not to be obscene in the constitutional sense, thus in total disagreement with the findings of the learned Federal District Court trial judge. See: *Schackman v. California*, 388 U.S. 454 (1967).

2. *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968).

Film strip of two nude females acting like Lesbians and fondling one another found not constitutionally obscene, citing *Redrup, supra*, as authority.

See the lower court case styled *State v. I. & M. Amusements, Inc.*, 226 N.E. 2d 567, where the Supreme Court of Ohio affirmed the Court of Appeals of Ohio, Hamilton County, convicting a motion picture corporation of exhibiting an obscene motion picture film.

The Supreme Court of Ohio set forth the descriptive testimony of an expert witness at the trial level:

"The same thing might be said of the defense expert witness on the subject of motion picture standards and practices, that the one segment of the film in question was simply 'a documentation of moving pinups, in some cases static pinups, '—a pinup being 'simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static.' "

Thereafter the Court set forth the descriptive quote of the trial judge:

> "In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, 'two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians.' "

However, when the case reached this Court in *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573, the state decisions were reversed in a per curiam opinion based upon *Redrup* holding in essence that the motion picture film was not obscene for adults.

3. *Robert-Arthur Management Corp. v. Tennessee*, 388 U.S. 578 (1968).

> Motion picture film entitled *Mondo Freudo* showing women caressing one another and acting as Lesbians found not constitutionally obscene based on *Redrup, supra*, as the controlling authority therefor.

See the case styled *Robert Arthur Management Corp. v. State of Tennessee*, 414 S.W. 2d 638 (1967), wherein the Supreme Court of Tennessee, in affirming the trial court's finding that the film *Mondo Freudo* was obscene, stated:

> "We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially

beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

4. *Cain v. Kentucky*, 397 U.S. 319 (March 23, 1970).

This decision involved the motion picture *I, A Woman.*

A description of the film is set forth by the Court of Appeals for Kentucky in the case styled *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 (1969), wherein it was stated:

"We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompainment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed

as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film; it is nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming."

This Court reversed this judgment in a 6-2 per curiam decision, citing *Redrup v. New York, supra,* as authority therefor.

5. *People of California v. Pinkus,* 400 U.S. 922 (1970).

This Court left standing a decision of the Ninth Circuit which held a stag movie graphically depicting a woman engaged in masturbation not to be obscene by a divided Court in affirming the judgment of the Ninth Circuit of Appeals in case there styled as *Pinkus v. Pitchess,* 429 F.2d 416.

Pinkus was charged with committing sixteen violations of the California Obscenity Statute but only nine of the sixteen were submitted to the Jury and he was found guilty. The Petition for habeas corpus followed and the Circuit Court of Appeals ultimately reversed and in doing so, stated as follows:

> "We have concluded that it was. The 'worst' of the material is described as a motion picture of a woman who, disrobed, feigns some type of sexual satisfaction which is self-induced. The film is apparently typical of the usual 'stag' movies which the courts encounter with increasing frequency. In the state court trial, the prosecution introduced no persuasive testimony that the material was offensive to contemporary notions of free expression. The district judge, as did the state court jury, made the factual determination that the film was obscene, but we have concluded that we cannot reconcile the determination with Supreme Court decisions in several cases involving comparable material. See, e.g., *Bloss v. Dykema*, U.S. , 38 U.S.L.W. 3477 (1970); *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 Sup. Ct. 1414 (1967). See especially, *Aday v. United States*, 388 U.S. 447, 18 L. Ed. 2d 1309, 87 Sup. Ct. 2095 (1967), *revg.* 357 F. 2d 855 (6th Cir. 1966).

6. *Bloss v. Michigan*, 402 U.S. 938 (1971).

This Court reversed the conviction for showing an obscene movie entitled "A Woman's Urge" of Floyd G. Bloss, citing *Redrup*. The Court of Appeals for the State of Michigan in its decision entitled *The People of the State of Michigan v. Floyd G. Bloss*, had adopted the trial judge's recital of the pertinent facts:

"The pertinent facts are set forth in the trial judge's decision on the motion for new trial:

> 'The testimony at the trial indicated that "A Woman's Urge" was shown at the Capri Theatre from February 2nd to February 8, 1966. On the evening of February 3, 1966 certain police officers and officials of the city of Grand Rapids, together with professors from Calvin and Aquinas Colleges attended the showing of "A Woman's Urge". Thereafter, a meeting was held at the prosecuting attorney's office and on the evening of February 8, 1966, members of the vice squad purchased tickets for the showing of "A Woman's Urge" and saw the entire film. Immediately thereafter, two members of the vice squad, who had seen the movie, went to the projection booth, there found Billy C. Sturgess in the projection booth, rewinding the film to "A Woman's Urge". The officers identified themselves and arrested Mr.Sturgess and seized the film incidental to the arrest. Thereafter they permitted Mr. Sturgess to continue showing the motion picture which was then being shown and subsequently brought him to the police department where he was served with a complaint and warrant. Likewise a complaint and warrant were served upon Mr. Bloss, who came to the police department at the request of the police officers. At the trial several police officers testified in detail as to the movie and applied the "Roth test" to the movie. In addition an expert witness from Aquinas College was called who testified relative to the movie and applied the Roth test. The jury, after extensive deliberation, convicted Mr. Bloss.

. . .

'We must decide, therefore, whether the film is obscene in the constitutional sense as delineated by the Supreme Court of the United States. See *Roth v. United States, supra; Redrup v. State of New York* (1967) 386 U.S. 767 (87 S.Ct. 1414, 18 L.Ed. 2d 515); *Memoirs v. Massachusetts* (1966), 383 U.S. 413 (86 S.Ct. 975, 16 L.Ed. 2d 1); *Ginzburg v. United States* (1966) 383 U.S. 463 (86 S.Ct. 942, 16 L.Ed. 2d 31); *Mishkin v. New York* (1966) 383 U.S. 502 (86 S.Ct. 958, 16 L.Ed. 2d 56). For us to find that this movie is obscene, we must find that the dominant theme of the movie as a whole appeals to prurient interest in sex, that it is patently offensive because it goes beyond contemporary community standards relating to the description or representation of sexual matters, and that it is utterly without redeeming social value. *Roth v. United States, supra.* Unless we find that these three elements coalesce, we cannot find that it is obscene. *Memoirs of a Woman of Pleasure v. Massachusetts, supra,* 419. We viewed the film, and we find the necessary coalescence here. Therefore, we find the film to be obscene.

'The film deals with the problems of a seemingly oversexed young woman. Although it has a psuedo psychoanalytical approach, its primary appeal is to prurient interest in sex. This prurient appeal is the dominant theme of the movie as a whole. The film is utterly without redeeming social value. Further, we find that it goes beyond the contemporary national community standards in its descriptions and representations of sexual matters. We would note here that in making this decision as to whether this film goes beyond the contemporary standards, we took into

consideration not just the content of the film, but also the impact of the conditions under which this content is conveyed to the viewer. By this we mean that even though the acts and occurrences if they were described in the written word would not be obscene, the visual impact of seeing the same thing acted out in a darkened room with sound accompaniment may cause it to be obscene. We find support for this distinction in *Landau v. Fording* (1966) 245 Cal. App. 2d 820 (54 Cal. Rptr. 177), *aff'd per curiam*, 38 U.S. 456 (87 S.Ct. 2109, 18 L.Ed.2d 1317) (1967) 5-4, *reh. denied*, 389 U.S. 889 (88 S.Ct. 16, 19 L. Ed. 2d 199) (1967)."

Yet, the Supreme Court of the United States granted the *Petition for a Writ of Certiorari* and reversed.

7. *Hartstein v. Missouri* No. 71-190, decided December 14, 1971, 10 CrL 4093, U.S. , S.Ct. , L.Ed.2d (1971).

On Tuesday, December 14, 1971, this Court reversed an obscenity conviction obtained in the State of Missouri. The reversal was based on *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

The Supreme Court of Missouri described the material involved, a motion picture entitled "Night of Lust," as follows:

"... [I]n most if not all instances without any relation to the plot, if any can be said to exist, are scenes of nude women including closeup protrayals of naken breasts. . . .'Night of Lust' is approximately 65 minutes in length, and approximately 40 of those

minutes consist of scenes of nude girls in various poses, actions, and sequences, which bear no relation to a plot, and apparently are presented for the sole purpose of depicting nude girls in activity suggestive of sexual intercourse or of homosexual activity.

. . .

"Under no possible standard could the motion picture 'Night of Lust' be related to art, literature or scientific works. It is the portrayal of nude women, which when considered alone may not be considered obscene according to language in *Manual Enterprises, Inc. v. Day, supra,* or obscene for adults. *Ginsberg v. State of New York, supra.* However, that is not the limits of the portrayal in 'Night of Lust.' By reason of the closeup scenes, and by use of nude body gyrations and undulations the motion picture suggests promiscuous sexual intercourse and homosexual activity which is totally unrelated to any plot. Such scenes are patently offensive and are incorporated into the picture only to appear to the prurient interest of the viewer. Such portrayals are not 'fragmentary and fleeting,' *Jacobellis v. State of Ohio, supra,* but because of the quantity of such portrayals, the result is that the dominant theme of the picture, when considered as a whole, is the suggestion of promiscuous sexual intercourse and homosexuality." (Emphasis added.)

8. *Wiener v. California,* No. 71-443, decided December 14, 1971, 10 CrL 4093, U.S. , S.Ct. , L.Ed.2d (1971).

This Court reversed judgment of the Appellate Department, Superior Court of California, County of San

Diego, based on *Redrup v. People of the State of New York, supra.* The following magazines and films were the subject matter of the California judgment:

A magazine entitled "My-O-My"
A magazine entitled "Wild-n-Sassy"
A magazine entitled "Hello"
A magazine entitled "The Ballers," No. 1
A magazine entitled "Psychedelic"
A 200' color film
A 1200' color film
A 16 millimeter 400' color film
A 16 millimeter 400' color film
An 8 millimeter 400' color film

The California Superior Court, Appellate Department, affirmed the trial court:

> "We do not engage in the task of translating the motion pictures or the photographs into words. Suffice it to say that we have performed one duty (as properly suggested by appellants), and exercised our independent judgment with regard to each exhibit. We conclude that under the present state of the law as developed by Roth and subsequent cases, the evidence presented by the People (with the one exception hereinafter noted) was legally and factually sufficient to support the jury's findings of guilt. We find ample evidence to support the three principal requirements already noted, to wit:
>
> > 'That 1. The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

'2. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

'3. The material is utterly without redeeming social value.' "

Yet, this Court did reverse the conviction, without opinion provisions on *Redrup v. New York, supra.*

The Georgia Supreme Court in it's first decision issued on November 5, 1971 held that there was probable cause to believe that the films were obscene and the trial judge had erred in making a final adjudication of the merits of the case. When it was pointed out to the Georgia Supreme Court by both the Prosecutor and Counsel for Petitioners, in their respective Petitions for Rehearing that the trial Court was authorized to make a final adjudication because the parties had stipulated that the hearing before the trial judge to be the final determination on this matter and that no further hearings were contemplated. When the Georgia Supreme Court was confronted with this oversight on their part which made their opinion clearly erroneous, they filed a revised opinion on November 18, 1971 to replace the one originally filed in which they characterized the films in this case as "hard core pornography." and held it unprotected by the First and Fourteenth Amendments to the U.S. Constitution.

After filing their revised opinion, on November 18, 1971, they did on the same date deny both the Motions for Rehearing filed by Counsel for both sides. The original opinion, and the revised or corrected opinions of this Court are set forth in the Appendix.

It would appear that the Georgia Supreme Court when confronted with the first case in its history, where the trial judge after considering all the evidence and law in the case found the publications not obscene, could not leave the lower court decision standing and undertook on its own to rule the motion picture film obscene in the constitutional sense in the complete abscence of any evidence in the trial record or in the briefs and argument before it on which to base such highly unusual reversal of the said trial court. The only affirmative evidence adduced by the prosecution was that the Paris Adult Theatre I and II exhibited to adults only, no minors permitted on the premises and that a modest but polite forewarning was on the door to prevent potential intrusion into the privacy of unsuspecting adults who wished to avoid confrontation with erotic materials. Further, the only evidence before the trial Court and Supreme Court of Georgia demonstrated that there was no *Ginzburg*-type pandering involved in this case.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed, which found fruition in 1967 in the case of *Redrup v. New York*, 386 U.S. 767 (1967). For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the First Amendment rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in the case, *Ginzburg v. United States,* 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v.*

New York, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, No. 71-443 10 CrL 4093 (December 14, 1971); *Hartstein v. Missouri*, No. 71-190, 10 CrL 4093 (December 14, 1971).

In none of the motion pictures involved, in none are there explicitly depicted sexual intercourse, fellatio, cunnilingus, or oral intercourse. The motion picture films are comparable to the matter depicted in *Burgin v. South Carolina, supra; Bloss v. Dykema, supra;* and *Wiener v. California, supra.*

From the rationale of the holdings of this Court, it is suggested that five very important principles emerge.

First, that "girlie" pictures and magazines of nude females in various poses as well as pictures and magazines of nude males and male and female, male and male, female and female, are not obscene in the constitutional sense absent the graphic depiction of explicit sexual acts.

The second principle is that all literary publications containing story lines illustrated or non-illustrated hard-cover or paperback are protected expression and conversely are not obscene in the constitutional sense.

The third principle is that pictorial portrayal on motion picture film of nudes either male or female together with suggested sexual congress or suggested variant sexual acts constitute protected expression under the *First Amendment*

absent actual depiction of these acts where no imagination is required to see the acts in progress, and where no pretense of artistic (social) value is demonstrated. That is, mere body movement or vocal utterances and the like, separate and combined, do not suffice to meet the test of obscenity. The film must show actual insertion or genital travel in the actual act of intercourse or sodomy, or actual act of cunnilingus or fellatio, absent a pretence of artistic (social) merit.

The fourth principle, and probably the most important, is that if the particular material meets the proscribable tests as set forth heretofore there may still be valid consideration sufficient to encompass the material under the protective umbrella of the *First Amendment* freedoms. This principle, often times referred to as "redeeming social value," is that the act performs a purpose within the context of the material and the work conveys an idea or attempts to convey an idea for the creator or to the recipient. Therefore, if in fact there is a modium of redeeming social value, the materials may not be proscribed.

The fifth principle lies in the manner of dissemination. Where materials are disseminated to willing adults in an adults-only environment, i.e., "adults only theatre" or "adults only bookstores" and not pandered or foisted upon an individual wishing to avoid confrontation with it or disseminated to juveniles, the materials are not proscribable.

Under controlling decisions of this Court, the motion picture films herein involved are not obscene in the constitutional sense, especially where, as here, none of the factors deemed important in *Redrup v. New York, supra*, are present.

2. THERE CANNOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION OF OBSCENITY AS TO EACH OF THE FILMS BROUGHT BEFORE THE SUPREME COURT, CONSISTENT WITH PETITIONERS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THE ABSENCE OF ANY AFFIRMATIVE EVIDENCE ON EACH OF THE CONSTITUTIONALLY RELEVANT ELEMENTS OF THE STANDARDS FOR JUDGING PROSCRIBABLE OBSCENITY UNDER THE FIRST AMENDMENT.

Since obscenity prosecutions or injunctive proceedings as in this case are in themselves fraught with vagueness, the courts have held that in such prosecutions or proceedings, undertaken under a constitutionally permissible basis, the prosecution or in this case, the State of Georgia, has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity, including contemporary community standards.

In Re *Giannini*, 72 Cal. Rptr. 655 (1968) the Supreme Court of California stated in pertinent part:

> "We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency . . . To sanction convictions without expert evidence of community

standards encourages the jury to condemn as obscene or offensive to the particular juror . . . We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Isler's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

The Supreme Court of the Commonwealth of Virginia likewise has held in the case of *House v. Commonwealth*, 169 S.E.2d 572 (1969), reported on September 5, 1969, on this issue as follows:

"In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters.

. . . . . .

As to the sufficiency of the evidence, we agree with the defendant that since the statute provides punishment for 'every person who knowingly . . . commercially distributes . . . any obscene matter, the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retain dealer Swersky . . . In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the

evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc., et al,* 258 A.2d 865 (1969), and said in pertinent part as follows:

"Nor has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the mie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever. Cf. *Dell Publications,* 427 Pa. at 193, 223 A.2d at 843.

"As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value . . . .

"Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs* and *Dell Publications* that 'Therese and Isabelle' is constitutionally obscene."

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332:

"Where the transcedent value of speech is involved, due process certainly requires in the circumstances of

this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325, *supra*.

"The vice of the present procedure is that, where particular speech fails to close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857, *supra*, provide but shifting sands on which the litigant must maintain his position."

Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 80 S.Ct. 215, concurring Opinion of Justice Frankfurter:

"...[F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefor to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patent ability of a controverted device.

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. There interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personel [sic] upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

People v. Rosakos, 74 Cal. Rptr. 34 at 36 (1968):

"This case must be reversed for a second reason, which is the holding in In re Giannini and Iser, 69 A.C. 588, 72 Cal. Rptr. 655, 446 P. 2d 535.

"In that case the court was dealing with violations of Penal Code Section 314, subdivision (1) and Penal Code Section 647, subdivision (a). (The alleged offenses occurred in the presentation of a dance before an audience. The court in that case affords the dance *First Amendment* protection unless the dance is obscene. In order to determine whether or not the dance was obscene the court holds at page 599, 72

Cal. Rptr. at page 662, 446 P.2d at page 542, . . . a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity,' and the court further states at pages 599-600, 72 Cal. Rptr. at page 663, 446 P.2d at page 543:

"Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

"We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

"(2) In the case at bar no evidence of community standards was introduced. We therefore hold that the evidence is insufficient on the present record to sustain the conviction as to count VII.

"The judgment is reversed."

United States v. Klaw, 350 F.2d 155 (1965):

"Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judge by whom? on what basis? For example, is it the average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else

applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight, or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation, the Court itself has acknowledged that it 'is not perfect.' *Jacobellis v. Ohio, supra,* 378 U.S. at 191, 84 S.Ct. 1676. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.

"Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an 'average man' or a 'deviant typical recipient' basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer things such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the

'obscenity' laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the 'effect' of the material on the people reached by it. See 354 U.S. at 490, 77 S.Ct. 1304.

"... And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a devient segment of society whose reactions are hardly a matter of common knowledge.

. . . . . .

"However, some proof should be offered to demonstrate such appeal, thereby supplying the fact finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, 'obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.' *Klaw v. Schaffer, supra,* 151 F.Supp. at 539 n.6; see *Manual Enterprises, Inc. v. Day,* 110 U.S. App. D.C. 78, 289 F.2d 455 (1961, rev'd, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)).

"In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no 'evidence from which the jury could find that it (Nutrix materials) would in fact appeal to the prurient interest of a particular class.'

"Furthermore, nothing in the record shows that the material even has prurient appeal to the average man.

"... In this case, however, the only predicate for any conclusion about prurient appeal was the material

itself, as if *res ipsa loquitur.* The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' "

Commonwealth v. Dell Publications, Inc., 233 A. 2d 840 (1967):

"In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, and and by itself, was the determining factor. As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue, but the mere donning of judicial robes does not make us the embodiment of the 'average person' nor do our tastes necessarily parallel those of the 'contemporary community.'

"The totally subjective approach adopted by the court below was palpable error.

. . . . . .

"A. Appeal to Prurient Interest. This is perhaps the most difficult of the three elements to define. What appeals to the prurient interest of one individual may not appeal to the prurient interest of another. Some cases may pose a problem of group definition, but it is conceded that 'Candy's' appeal is to the community at large and thus we must judge its prurient appeal to the 'average person.'

"Unfortunately, there was practically no testimony offered concerning 'Candy's' appeal to the prurient interest of the average adult citizen.

"The Commonwealth presented practically no evidence whatsoever concerning 'Candy's' relationship to contemporary community standards."

Dunn v. Maryland State Board of Censors, 213 A.2d 751 (1965):

"In the present instance the Board did no more than offer the film; it produced no other evidence whatever. We think it plain that save in the rare case where there could be no doubt that the film is obscene the Board will not meet the burden of persuasion imposed on it by the Constitution and the statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interests, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '. . . sex and obscenity are not synonymous, *Roth,* U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity. In our view, neither the judge who may sit in the circuit court to review the adtion of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."

Hudson v. United States, 234 A.2d 903 (1967):

"Where the material involved is not patently obscene, neither a judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally without first being given some competent evidence of what those standards are. *United States v. Klaw*, 350 F.2d 155, 168 n. 14 (2d Cir. 1965). A guilty verdict is an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the prevailing customs in a limited geographical area and, at worse, upon the 'subjective reflection of taste or oral outlook of individual jurors or individual judges. . . .' [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.' *Smith v. People of State of California*, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959), concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial.

"Since the prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, we hold that the Government failed to establish an essential element of the crime charged and the verdicts of guilty were therefore in error."

See also *Ramirez v. State*, 430 P.2d 826 (1967), and *City of Phoenix v. Fine*, 420 P.2d 26 (1966).

"... [W]e reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are obscene under any of the views expressed in Redrup are the publications themselves. Apparently, the prosecution believes that a theory [sic] akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards."

And recently in the Court of Special Appeals of Maryland in the matter styled *Woodruff v. State*, 237 A.2d 436. His Honor, Judge Moylan appropriately stated:

"In measuring then the prurient appeal of this theme, we must do so in terms of a particular audience. *There was no evidence in this case to indicate that, under Mishkin, it was 'designed for or primarily disseminated to a clearly-defined deviant sexual group.'* We must, therefore, measure prurience in terms of its appearance to the average person. (Emphasis added.)

. . . . . .

"It is axiomatic that to judge whether something offends contemporary community standards, one must know what those contemporary community standards are. In this case, the State neither showed nor offered any evidence whatsoever as to the standards prevailing in Prince George's County, the State of Maryland or the United States, whichever of those communities will ultimately be deemed the appropriate 'community.' *Jacobellis v. Ohio, supra.* By way of defense, the appellant did make two

abortive attempts to offer testimony as to the prevailing community standards, at least within Prince George's County.

. . . . . .

"This failure of the trial court to afford the appellant an opportunity to prove what he believed to be the prevailing community standard is not material, however, in view of our belief that the State failed utterly to make even a *prima facie* showing of any community standard whatsoever. We feel, as did Judge Orth in his concurring opinion in *Dillingham v. State, supra*, 9 Md. App. at 715, 267 A.2d at 801:

> 'I cannot determine from the record whether or not the material affronts contemporary community standards relating to the description or representation of sexual matters. The State, as the opinion of the Courts points out, did not prove what the contemporary community standards are, either national or local. . . . It is not possible to determine that the material here affronted contemporary community standards when the standards themselves are not delineated. Thus, the second element was not proved and this alone would be good reason to reverse the conviction.'

. . . . . .

"In making our own independent, reflective judgment upon the material, we feel that the view expressed by Judge (now Chief Judge) Hammond in *Dunn v. Maryland State Board of Censors, supra*, 240 Md. at 255, 213 A.2d at 754, even though dealing with alleged obsenity in the context of motion picture censorship, is pertinent:

> 'In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded those constitutional standards or tests without enlightening testimony on these points.'
>
> . . . . . .
>
> "Even were the material before us obscene by any test, however, the conviction of the appellant here would have to be reversed because of the utter failure of the State to show any evidence of *scienter* on his part as required by *Smith v. California.*"

In the recent case of *United States v. Groner, No. 71-1091*, CA-5, decided January 11, 1972, the Fifth Circuit Court of Appeals reversed a conviction for using a common carrier in interstate commerce to transport a quantity of obscene books in violation of 18 U.S.C. §1462:

> "There remains little doubt that this Court is obligated to make an independent evaluation on the issue of whether the material in question is obscene. The issue of obscenity involves the application of first amendment rights to the printed word. The courts, not the reasonable jury or even the majority of reasonable men, are responsible for the protection of freedom of speech. The substantial evidence test, usually employed to reinforce jury verdicts, thus cannot be utilized to apply these constitutional doctrines.
>
> "We have little trouble in finding the books involved in the instant case to be vile, filthy, disgusting, vulgar, and, on the whole, quite uninteresting. We do, however, have difficulty in equating these adjectives with the constitutional definition of obscenity.

"Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.

"Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' in describing sex or nudity. Each juror is an individual—separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we

as a Court, or an individual's left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prurient appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, same, healthy individual. It is just too disgusting and revolting to be so classified. *To allow a case to go to a jury of layman under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to some known, undefined person whose psyche is not known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury censors at the hands of the appellate courts.*

"We wish to make it perfectly clear what we hold, and what we fail to hold today in the instant case. We have expressed no opinion on the issue of whether the material involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights." United States v. Groner, supra,* (Slip Opinion).

No evidence was produced by the State of Georgia through any competent witness as to the prurient interest appeal of the motion picture film. Similarly there was no evidence reflecting upon the prevailing community standards.

The State did not produce any evidence as to whether the Motion Picture Films did not contain any redeeming social value. And there was no evidence that the Motion Picture Films exceeded the prevailing community standards.

It is not incumbent upon the citizen, in securing those freedoms guaranteed to him by virtue of the *First and Fifth Amendments to the Constitution of the United States*, to affirmatively show that the materials constitute protected expression. But the burden is upon them who week to suppress the presumptively protected materials to affirmatively show by sufficient competent evidence that the materials are not protected by the *Constitution of the United States* before the materials can be suppressed, seized, and destroyed.

To find Motion Picture Films obscene on such an utter lack of affirmative evidence constitutes a denial of Due Process secured to Petitioners by virtue of the *First, Fifth and Fourteen Amendments to the Constitution of the United States*. It is respectfully represented that the State of Georgia has utterly failed to present even a *prima facie* case of obscenity.

3. THE STATE OF GEORGIA MAY NOT, CONSISTENT WITH THE *FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS* TO THE *CONSTITUTION OF THE UNITED STATES*, UTILIZE *AD HOC* PROCEDURES TO ENJOIN DISSEMINATION OF PRESUMPTIVELY PROTECTED FIRST AMENDMENT MATERIALS WHERE THERE IS NO STATUTORY PROCEDURE OR AUTHORITATIVE JUDICIAL DECISION

AUTHORIZING THE SAME WITH APPROPRIATE PROVISIONAL SAFEGUARDS.

In many of the cases cited herein for support of the position of the Appellants that procedural Due Process within the area of *First Amendment freedoms* requires a constitutionally valid statutory procedure, the United States Supreme Court did, in fact, strike down statutory schemes and procedures which were, as the Court stated, "infected with the statutory vice of vagueness or impermissible overbreadth." The language of the High Court in those cases reiterates time and time again that special rigid procedural Due Process safeguards must be employed and those special rigid procedural Due Process safeguards must ensure that there will be no curtailment "of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."

Mr. Justice Frankfurter has once said, "The history of American Freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945).

Although this was said in the context of criminal procedure, the views expressed were reaffirmed and elaborated on in *Speiser v. Randall, supra.* when Mr. Justice Brennan for the Court wrote as follows:

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 441,

442, 1 L. Ed. 2d 1469, 1473, 1474, 77 S. Ct. 1325; *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625; *cf Cantwell v. Connecticut*, 310 U.S. 296, 305, 84 L. Ed. 1213, 1218, 60 S. Ct. 900, 128 LAR 1352; *Joseph Burstyne, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665; *Niemotko v. Maryland*, 340 U.S. 268, 95 L. Ed. 267, 71 S. Ct. 325, 328; *Staub v. Baxley*, 355 U.S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277.

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. *Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.* And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell v. Alabama*, 287 U.S. 45, 71, 77 L. Ed. 158, 171, 53 S. Ct. 55, 84 ALR 527. *When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances,* cf. *Dennis v. United States*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, and *Whitney v. California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641, both *supra, the procedures by which the facts of the case are*

adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford . . . " (Emphasis added.)

In 1962, three (3) justices of the Court stated in the case of *Manual Enterprises Inc. v. Day*, 370 U.S. 478, 518-519(1962) in the plurality opinion by Mr. Justice Brennan as follows:

> "[We have] . . . no doubt that Congress could constitutionally authorize a non-criminal process in the nature of a judicial proceeding under *closely defined* procedural safeguards." (Emphasis added.)

Over and over again, the High Court speaks of *specified or closely defined* procedural safeguards within the context of those special circumstances or procedural Due Process constitutionally required within the exercise of *First Amendment* rights.

On September 8, 1969, a statutory Three-Judge Court sitting in the United States District Court for the Northern District of Georgia, in a case styled, *United States of America, et al. v. The Book Bin*, 306 F. Supp. 1023, in an opinion written by Judge Edenfield, held unconstitutinal a statutory scheme for allowing the Postmaster General to act to curb the flow of allegedly obscene materials through the mails. 39 *U.S.C.* § 4006 and 4007. Affirmed, United States, Supreme Court, 400 U.S. 410 (1971).

The chief contentions made by this counsel for the Book Bin, in Civil Action No. 12812, included the questions of the adequacy of the purported procedural safeguards in the statutory scheme to assure the protection of the exercise of *First Amendment* freedoms, and the adequacy of a procedure

which permitted a judicially imposed prior restraint upon

> "a showing of probable cause to believe the statute is being violated . . . pending the conclusion of the statutory proceedings and any appeal therefrom."

The Three-Judge Court in striking down 39 *U.S.C.* §4006 and §4007, made the following comments which are deemed to the proceedings at bar.

> "Second, the procedures established in Sections 4006 and 4007 do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman v. Maryland, supra* . . . To avoid *First Amendment* problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under Sections 4006, 4007, fall short of meeting these rigid requirements . . . the Court must issue a restraining order merely upon a showing of 'probable cause' . . . it is doubtful if the limited judicial finding implicit in the grant of a Section 4007 finding insulates the procedure from constitutional infirmity, since the Court issues its order merely on a finding of probable cause, not an actual determination of obscenity. Thus, the statutory scheme effectively operates as a prior restraing . . . While prior restraints are not *per se* indefensible, they bear a heavy presumption of invalidity . . . This presumptive invalidity is not overcome in the instant case by carefully drawn safeguards. Contrast *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The

> administrative procedures established by regulation under Section 4006, sec. 39 C.F.R. Sections 952.1-952.33, do not provide the procedural safeguards envisioned by *Freedman* and succeeding Supreme Court cases . . . The application of the Postmaster General here for an injunction under Section 4007 does not correct this constitutional flaw in the instant statutory network. As noted, Section 4007 does not permit a full judicial finding on obscenity, but restricts a' court to a finding of probable cause."

It would appear that many of the issues disposed of in *The Book Bin* case would apply with equal validity in the context of the case at bar, except that in the case at bar we are not dealing with any type of statutory scheme with built-in safeguards providing for any type of statutory procedural safeguards to assure nonobscene publications and materials the protections which are afforded under the *First Amendment.*

No procedural safeguards exist that assure (a) the time period within which an adversary hearing must be held after an injunction issues; (b) present proceedings may not contemplate any final judicial determination of obscenity, yet the injunction continues in force for an unspecified period of time; and (c) within what specified time period must final judicial review be concluded. In s, United States v. The Book Bin, supra, the Court said:

> "In *Freedman* itself, a delay of four months in securing initial judicial determination and six months in obtaining final appellate review was condemned."

In 1971, the Supreme Court, in a rarely seen unanimous opinion by eight (8) Justices, and Justice Black concurring, affirmed the judgment of both *United States v. The Book Bin* (D.C. N.D. Georgia) and *Blount, Postmaster General v. Rizzi, d/b/a The Mail Box* (D.C.C.D. California) 400 U.S. 410 (1971). The Court, speaking through Mr. Justice Brennan in the eleven (11)-page opinion, stated the case for specified statutory procedural due process safeguards within the area of the exercise of *First Amendment* freedoms as follows:

> "... [T]he finding under §4007 merely of 'probable cause' to believe material was obscene was not a constitutionally sufficient standard to support a temporary mail detention order. 306 F. Supp. 1023 (1969)... those procedures violated the *First Amendment* unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Rather, the *First Amendment* required that procedures be incorporated which 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line... Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards... is... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks...' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Since we have recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated... is finely drawn,... [T]he separation of legitimate from

illegitimate speech calls for . . . sensitive tools. . . .' *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

". . . [I]t is for Congress, not this Court, to rewrite the statute . . . That section does not provide a prompt proceeding for a judicial adjudication of the challenged obscenity of the magazine . . . We agree with the three-judge court in *Book Bin* that to satisfy the demand of the *First Amendment* 'it is vital that prompt judicial review on the issue of obscenity–rather than merely probable cause–be assured on the Government's initiative before the severe restrictions in §4006, 4007 are invoked.' 306 F. Supp. at 1028.

"Thus the statute not only fails to provide that the district court should make a final judicial determination of the question of obscenity, expressly giving that authority to the judicial officer, but it fails to provide that '[A]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.' 380 U.S. at 59 . . . 'will have a severe restriction on the exercise of (appellees') *First Amendment* rights–all without a *final* judicial determination of obscenity.' 306 F. Supp. at 1028.'.

Thus the Supreme Court, by virtue of its recent pronouncement dealing with the constitutional requirement of a statutory scheme to assure procedural Due Process safeguards within the area relating to the exercise of *First Amendment* freedoms, clearly invalidates the *ad hoc* proceedings sought to be employed by counsel for the State of Georgia.

It can be anticipated that counsel for the State will argue that the permanent injunction obtained by the State is necessary to prevent the commission of crimes; i.e., Georgia Code §26.2101. The Supreme Court has heretofore rejected this claimed rationale to support a prior restraint, as follows in *Caroll v. President and Commissioners of Princess Anne County*,393 US 175 (1968).

> "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the *First Amendment* sought to protect against abridgment." Supra at pages 180-181.

Certainly, under the procedural Due Process decisions of the Supreme Court, the *ad hoc* procedure sought to be invoked by counsel for the State is clearly constitutionally deficient and repugnant to the *First, Fourth, and Fifth and Fourteenth Amendments to the Constitution of the United States* within the context of the exercise of *First Amendment* freedoms.

CONCLUSION

The Trial Court found the motion picture films involved herein not obscene on the basis of the evidence and the law. The Georgia Supreme Court, unguided by evidence on the elements of obscenity, found the motion picture films obscene. The motion picture films are of the type involved in

other cases before this Court found not obscene in the constitutional sense and accorded the *Redrup* treatment.

For the reasons set forth in the Petition herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel the within and foregoing Petition for A Writ of Certiorari To The Supreme Court of Georgia by mailing two (2) copies thereof, postage prepaid, to:

Thomas E. Moran, Esquire
Suite 820, Northside Tower
6065 Roswell Road, N.E.
Sandy Springs, Georgia, 30328

Thomas R. Moran, Esquire
160 Pryor Street, S.W.
Civil-Criminal Court Building
Atlanta, Georgia, 30303

Hinson McAuliffe, Esquire
160 Pryor Street, S.W.
Civil-Criminal Building
Atlanta, Georgia, 30303

This day of FEBRUARY, 1972.

ROBERT EUGENE SMITH,
Esquire

APPENDIX A

IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

Civil Action No. B-61298

LEWIS R. SLATON,
as District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE,
as Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,
v.
PARIS ADULT THEATRE I,
ROBERT MITCHEM,
PHILLIP A. FISHMAN, CLIFF TERRY,
FRED PRICHARD, and
JOE BALLEW,
Defendants.

Civil Action No. B-61299

LEWIS R. SLATON,
as District Attorney,
Atlanta Judicial Circuit, and
HINSON MC AULIFFE,
as Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,
v.
PARIS ADULT THEATRE II,
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, and
JOE BALLEW,
Defendants.

ORDER

The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are "It All Comes Out in the End" and "Magic Mirror."

Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

The actions against the Defendants, therefore, are dismissed.

This 12th day of April, 1971.

/s/ Jack Etheridge
Judge, Superior Court of
Fulton, County, Atlanta
Judicial Circuit.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

Case No. 26631

LEWIS R. SLATON,
As District Attorney, et al
Appellants
v.
PARIS ADULT THEATER I, et al
Appellees.

LEWIS R. SLATON,
As District Attorney, et al
Appellants
v.
PARIS ADULT THEATER II, et al
Appellees.

Decided: NOV-5, 1971

In the Supreme Court of Georgia

26631 SLATON, District Attorney, Et Al v.
PARIS ADULT THEATER I, Et Al

1. Where, in a proceeding by the district attorney to have certain motion picture films declared to be obscene and subject to be seized and seeking temporarily and permanently to enjoin the showing of the same, the matter came on for a hearing pursuant to an ex-parte order requiring the defendants to show cause on a day certain 10 days from the issuance of such order why the

relief prayed for should not be granted and why a temporary injunction should not issue, it was error for the trial judge on such hearing to finally adjudicate the merits of the case and to dismiss the plaintiff's complaint.

2. The evidence was sufficient to authorize a jury to find that the films involved in this case are obscene. Upon such a finding, their exhibition in a commercial theater to willing adult audiences may be properly enjoined since it is not protected by the first amendment.

3. The denial of a temporary injunction in this case exposed the plaintiff to the hazard that the question sought to be adjudicated might become moot, and, under the principle of the balancing of conveniences, it was error to deny a temporary injunction restraining the exhibition of the films.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures. Following the procedure approved by this court in Evans Theater Corp. v. Slaton, 227 Ga. 377 (180 SE2d 712), and followed in Watler, et al. v. slaton, 227 Ga. 676 (182 SE2d 464), and in 1024 Peachtree Corp., et al., v. Slaton [No. 26612; decided]. Lewis R. Slaton, as District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants to show cause on a date certain why motion picture films, "It All Comes Out in the End." and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly

issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. The parties agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the trial judge would be a final judgment and order in each case. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment. " 'The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, "It All Comes Out in the End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions againststhe Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge, Superior Court of Fulton County, Atlanta Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you – PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel,* U.S. , *28 L.Ed.2d 813, 91 S.Ct.* . *That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C.* § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted, but the trial court granted his motion to dismiss the indictment and, upon review, the

Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in Stanley, does not carry with it the right to sell and deliver such material. As we view the holding in the Reidel case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the Reidel case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the

films here involved is not not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.

Judgment reversed. All the Justices concur.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

Case No. 26631

LEWIS R. SLATON,
As District Attorney, et al
Appellants
v.
PARIS ADULT THEATER I, et al
Appellees

LEWIS R. SLATON,
As District Attorney, et al
Appellants
v.
PARIS ADULT THEATER II, et al
Appellees

In the Supreme Court of Georgia

Decided: Nov. 5, 1971

26631 SLATON, District Attorney, Et Al.
v.
PARIS ADULT THEATER I, Et Al.

The films involved in this case are hard core pornography.

Their commercial exhibition is not protected by the first amendment, and the trial court erred in refusing to enjoin their exhibition in a theater where all adult persons willing to pay the price were admitted.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures. Following the procedure approved by this court in *Evans Theater Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), and followed in *Walter, et al v. Slaton*, 227 Ga. 676 (182 SE2d 464), and in *1024 Peachtree Corp., et al. v. Slaton*, [No. 26612; decided]. Lewis R. Slaton, as District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants to show cause on a date certain why the motion picture films, "It All Comes Out in the End," and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment: " 'The State contends that the motion picture under review in the above actions are obscene. The titles of the films are, "It All Comes Out in the End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge, Superior Court of Fulton County, Atlanta Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

1. As was pointed out in *Walter v. Slaton, supra*, the initial hearing in this kind of proceeding presents for the judge's decision only the question of whether there is probable cause to hold the material in question to be obscene, and, therefore, whether the exhibition of a motion picture or the distribution of literature shall be temporarily enjoined until the ultimate question of obscenity can be passed upon by a jury. Therefore, "on the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory

relief." *Florida Central R. Co. v. Cherokee Sawmill Co.*, 137 Ga. 815 (6) (74 SE 523); *Kight v. Gilliard*, 214 Ga. 445 (2) (105 SE2d 333); *Smith v. Davis*, 222 Ga. 839, 841 (152 SE2d 870); *Oliver v. Forshee*, 224 Ga. 200, 202 (160 SE2d 828). In the instant case, a question of fact was presented as to whether applying contemporary community standards the dominant theme of the films in question, taken as a whole, is to the prurient interest, and whether they are entirely without redeeming social value. The films themselves were in evidence. They spoke for themselves, and we have reviewed them in the discharge of our function as a court of review, along with the transcript of the oral testimony adduced upon the hearing. Conceding that the testimony of the so-called expert witness who testified on the trial on behalf of the defendants as to the redeeming social value of the films, when considered in connection with the films themselves made an issue of fact as to whether the films are obscene, this was a question which, under our procedure, necessarily had to be submitted to the jury upon the final determination of the case, and under the cases last cited it was clearly error for the trial judge to pass an order dismissing the complaint. It cannot be said under the state of the record before this court that a finding in favor of the complainants could not under any conceivably provable circumstances be authorized.

2. Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you – PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution

of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel,* U.S. , 28 L.Ed.2d 813, 91 S.Ct. . That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted but the trial court granted his motion to dismiss the indictment, and, upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in Stanley, does not carry with it the right to sell and deliver such material. As we view the holding in the Reidel case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and

purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the Reidel case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We held that these films may be found to be obscene, and upon such a finding the showing of such films should be enjoined since their exhibition is not protected by the first amendment.

3. Generally, in the granting or denying of a temporary injunction, a wide discretion is vested in the judge of the superior court, and unless some substantial equity has been violated, this court will not control his exercise of that discretion in passing such interlocutory order unless it is shown to have been clearly abused. *Jones v. Johnson*, 60 Ga. 260 (3); *Green v. Fuller*, 223 Ga. 204 (1) (154 SE2d 220); *Mar-Pak Michigan, Inc. v. Pointer*, 225 Ga. 307, 309 (168 SE2d 141); *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 488 (9) (175 SE2d 847). However, where it is clear from the language of the order appealed from that the trial judge did not deny the temporary injunction in the exercise of his discretion, but that his denial was based upon an erroneous

interpretation of the law, the foregoing rule does not apply. *Ballard v. Waites*, 194 Ga. 427, 429 (2) (21 SE2d 848), and cits. Accordingly, under such circumstances, in reviewing the denial of a temporary injunction, this court should consider whether upon the application of the principle of the balancing of conveniences the denial of a temporary injunction would leave the plaintiff practically remedyless in the event he should thereafter establish his right to a permanent injunction. *Everett v. Tabor*, 119 Ga. 128 (4), 130 (46 SE 72); *Maddox v. Willis*, 205 Ga. 596 (5) (54 SE2d 632); *Stephens v. State Highway Department*, 223 Ga. 713, 714 (1) (157 SE2d 751). Applying the foregoing propositions to the facts of this case, it is apparent that a temporary injunction was necessary in order to protect the jurisdiction of the court and to prevent the case from becoming moot. It follows that the trial judge erred in denying the temporary injunction.

Judgment reversed. All the Justices concur.

APPENDIX D

FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT, U.S.C. and Georgia Code § 26-2101

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE § 26-2101

26-2101. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable

and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302, 1971, p. 344.)

(Page 138, Criminal Code of Georgia.)

APPENDIX E

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA NOV 19 1971

~~Your briefs in the following have been received and filed, to wit~~

Case No. 26631, Lewis R. Slaton, D. A., et al
V. Paris Adult Theatre I, et al

THE MOTION FOR REHEARING
Was DENIED TODAY

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk